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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LINWOOD SUTTON,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

15 Defendant.
16
17

Case No. 14-CV-2008-BAS (JMA)

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE
RE PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT [ECF
NO. 16] AND DEFENDANT'S
CROSS-MOTION FOR
SUMMARY JUDGMENT
[ECF NO. 17]**

18 Plaintiff Linwood Sutton ("Plaintiff") seeks judicial review of Defendant
19 Acting Social Security Commissioner Carolyn W. Colvin's ("Defendant")
20 determination that he is not entitled to disability insurance benefits ("DIB")
21 and supplemental security income ("SSI"). The parties have filed cross-
22 motions for summary judgment. For the reasons set forth below, the Court
23 recommends Plaintiff's motion for summary judgment be **DENIED** and
24 Defendant's cross-motion for summary judgment be **GRANTED**.
25

26 **I. BACKGROUND**

27 Plaintiff, a resident of Vista, California, was born on January 7, 1951.
28 (Admin. R. at 47.) He graduated from high school and served eight years

1 in the Marine Corps. (Id. at 28-29, 36.) He has worked in the past for
 2 moving companies, in a plastic sheeting factory, as a general laborer, and
 3 as a janitor at Sea World. (Id. at 30-36, 228.) He last worked as a bell
 4 ringer for the Salvation Army in 2011, but that was seasonal work only and
 5 he otherwise had not worked since 2005. (Id. at 29-30, 187-89.) In
 6 applications for DIB and SSI filed on August 4, 2011, Plaintiff alleged a
 7 disability onset date of December 26, 2003 due to knee issues. (Id. at 160-
 8 77, 206-09.) Plaintiff's applications were denied initially on November 7,
 9 2011 and upon reconsideration on March 29, 2012. (Id. at 85-90, 96-100.)
 10 On April 9, 2012, Plaintiff requested an administrative hearing. (Id. at 102-
 11 03.) A video hearing was conducted on March 22, 2013 by Administrative
 12 Law Judge ("ALJ") John D. Moreen, who determined on May 20, 2013 that
 13 Plaintiff was not disabled. (Id. at 6-16.) Plaintiff requested a review of the
 14 ALJ's decision; the Appeals Council for the Social Security Administration
 15 ("SSA") denied Plaintiff's request for review on June 26, 2014. (Id. at 1-3.)
 16 Plaintiff then commenced this action pursuant to 42 U.S.C. § 405(g).

17 18 **II. MEDICAL EVIDENCE**

19 **A. Vista Community Clinic (Treating Provider)**

20 On June 7, 2011, Plaintiff presented to Donald Ong, M.D. of the Vista
 21 Community Clinic with a complaint of left knee pain. (Id. at 296-98.)
 22 Plaintiff reported he had been hurt at work in 2000, had arthroscopic
 23 surgery in 2004 which showed ligament injury, and had not had any follow-
 24 up, even though he experienced on and off pain since then. (Id. at 296.)
 25 Dr. Ong diagnosed a sprain of the medial collateral ligament, prescribed
 26 ibuprofen, and advised Plaintiff to obtain insurance so he could request an
 27 MRI. (Id. at 297.)

28 On July 2, 2011, Plaintiff returned to the Vista Community Clinic for

1 an office visit with Nurse Practitioner Charles Gentzsch. (Id. at 293-95.)
2 Plaintiff described his left knee pain as sharp and stated the pain was
3 aggravated by bending. (Id. at 293.) Nurse Gentzsch observed swelling,
4 mild pain with motion, and post-surgical scars on Plaintiff's left knee, and
5 provided Plaintiff with a note indicating he would be restricted to light or
6 limited work for two weeks. (Id. at 292, 294.)

7 **B. Phong T. Dao, D.O. (Examining Physician)**

8 Dr. Phong T. Dao conducted an internal medicine evaluation of
9 Plaintiff on October 17, 2011 at the request of the state Department of
10 Social Services. (Id. at 282-87.) Plaintiff advised Dr. Dao he had
11 experienced left knee pain since 2002 when he fell and injured his knee.
12 (Id. at 282.) He had surgery about eight months after the incident, which
13 had improved the knee pain until recently, when he noted increasing left
14 knee pain and occasional swelling of the knee with prolonged standing and
15 walking in June 2011. (Id.) At the time of the examination, the pain was an
16 "aching, throbbing, sharp" pain that occurred intermittently. (Id. at 282-83.)

17 On examination, Dr. Dao noted tenderness to palpation of the medial
18 aspect of the left knee. (Id. at 285.) An x-ray of the left knee showed early
19 osteoarthritis. (Id. at 286, 288.) Dr. Dao further noted Plaintiff ambulated
20 with a slight limp putting almost all of his weight on the right knee. (Id. at
21 286.) Dr. Dao diagnosed degenerative joint disease of the left knee. (Id.)
22 He opined Plaintiff could lift, carry, push, or pull 50 pounds occasionally
23 and 25 pounds frequently, could stand or walk for 6 hours in an 8 hour
24 workday, could sit with no limitation, and could frequently climb, stoop,
25 kneel, and crouch. (Id. at 286-87.)

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1 **III. THE ADMINISTRATIVE HEARING**

2 **A. Plaintiff's Testimony**

3 The ALJ conducted an administrative hearing on March 22, 2013.
4 (Id. at 25.) Plaintiff testified much of his past work has been seasonal and
5 he has not applied for full-time work since 1986 or 1987 because he has a
6 felony on his record from over thirty years ago. (Id. at 36-37.) He has
7 found people continue to think of him as a felon. (Id. at 36.) He testified he
8 is unable to work because of left knee problems. (Id. at 37.) He spends
9 his time babysitting his granddaughter, and performs housework including
10 vacuuming and washing dishes. (Id. at 38.) He does not have a driver's
11 license and takes the bus to get around town. (Id. at 39.)

12 Plaintiff testified he is able to stand for four hours, after which he
13 experiences a tingling sensation in his knee and has to get off his feet for at
14 least an hour and a half. (Id. at 39-40.) He does not have any problems
15 with sitting. (Id. at 40.) He grew tearful during his testimony and explained
16 that talking about his background and being unable to be hired for jobs as a
17 result of it is emotional for him. (Id. at 40.) He does not have friends he
18 sees socially, because the friends he used to see have felony records. (Id.
19 at 41.) He believes he could lift 20-30 pounds at a job because that would
20 not cause his knee to bend very much, but would have problems squatting
21 down. (Id.)

22 **B. Vocational Expert's Testimony**

23 The vocational expert ("VE"), Jane Haile, identified Plaintiff's past
24 relevant work as contribution solicitor (light, unskilled work), material
25 handler (heavy, semi-skilled work), and winder operator (heavy, unskilled
26 work). (Id. at 42.) In response to a hypothetical posed by the ALJ, the VE
27 testified a person of Plaintiff's age, education, and background, who could
28 occasionally lift 50 pounds and frequently lift 25 pounds, stand for 6 hours

1 in an 8 hour day, and sit for 6 hours in an 8 hour day, could perform the
 2 work of a contribution solicitor, but not the other two jobs. (Id. at 42-43.)
 3 There are no full-time contribution solicitor jobs that exist, as they are
 4 temporary, seasonal jobs. (Id. at 43.) The VE testified there are medium
 5 unskilled jobs in the local or national economy an individual such as
 6 Plaintiff could perform, including a hospital cleaner, store laborer, and hand
 7 packager. (Id. at 43-44.) The VE further testified a person who could
 8 stand for only 4 hours at a time and then needed to sit for 2 hours, and who
 9 could lift 20-30 pounds, could not perform medium work and would be
 10 limited to light level work. (Id. at 44.)
 11

12 **IV. THE ALJ DECISION**

13 After considering the record, ALJ Moreen made the following
 14 findings:

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- 16 2. The claimant has not engaged in substantial gainful activity
 17 since December 26, 2003, the alleged onset date [citations
 18 omitted].¹

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- 20 3. The claimant has the following severe impairment[]: early
 21 osteoarthritis of the left knee [citations omitted].

22

- 23 4. The claimant does not have an impairment or
 24 combination thereof that meets or medically equals the
 25 severity of one of the listed impairments in [the Social
 26 Security regulations].

27

- 28 5. After careful consideration of the entire record, I find that the

¹In making this finding, the ALJ found Plaintiff's earnings of \$7,801.50 in 2003, \$102.50 in 2004, and \$6,171.72 in 2005 did not meet substantial gainful activity level for the years in which they were earned. (Admin. R. at 11.)

claimant has the residual functional capacity to perform medium work as defined in 20 C.F.R 404.1567(c) and 416.967(c), he can lift 50 pounds occasionally, 25 pounds frequently; can stand/walk for six hours out of an eight hour day; can sit for six hours out of an eight hour day; and can frequently balance, crouch, crawl, kneel, stoop or climb.

. . . .

6. The claimant is unable to perform any past relevant work [citations omitted].

. . . .

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform [citations omitted].

. . . .

11. The claimant has not been under a disability, as defined in the Social Security Act, from December 26, 2003, through the date of this decision [citations omitted].

(Id. at 11-16.)

V. STANDARD OF REVIEW

To qualify for disability benefits under the Social Security Act, an applicant must show: (1) He or she suffers from a medically determinable impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of twelve months or more, and (2) the impairment renders the applicant incapable of performing the work that he or she previously performed or any other substantially gainful employment that exists in the national economy. See 42 U.S.C. § 423(d)(1)(A), (2)(A). An applicant must meet both requirements to be "disabled." Id. Further, the applicant bears the burden of proving he or she was either permanently disabled or subject to a condition which became so severe as to disable the applicant prior to the date upon which his or her disability insured status expired. Johnson v. Shalala, 60 F.3d 1428, 1432

(9th Cir. 1995).

A. Sequential Evaluation of Impairments

The Social Security Regulations outline a five-step process to determine whether an applicant is "disabled." The five steps are as follows: (1) Whether the claimant is presently working in any substantial gainful activity. If so, the claimant is not disabled. If not, the evaluation proceeds to step two. (2) Whether the claimant's impairment is severe. If not, the claimant is not disabled. If so, the evaluation proceeds to step three. (3) Whether the impairment meets or equals a specific impairment listed in the Listing of Impairments. If so, the claimant is disabled. If not, the evaluation proceeds to step four. (4) Whether the claimant is able to do any work he has done in the past. If so, the claimant is not disabled. If not, the evaluation continues to step five. (5) Whether the claimant is able to do any other work. If not, the claimant is disabled. Conversely, if the Commissioner can establish there are a significant number of jobs in the national economy the claimant can do, the claimant is not disabled. 20 C.F.R. § 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

B. Judicial Review

Sections 205(g) and 1631(c)(3) of the Social Security Act allow unsuccessful applicants to seek judicial review of the Commissioner's final agency decision. 42 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial review is limited. The Commissioner's final decision should not be disturbed unless: (1) The ALJ's findings are based on legal error or (2) are not supported by substantial evidence in the record as a whole. Schneider v. Comm'r Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000); Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). Substantial evidence means "more than a mere scintilla but less than a preponderance; it is such

1 relevant evidence as a reasonable mind might accept as adequate to
 2 support a conclusion.” Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
 3 1995). The Court must consider the record as a whole, weighing both the
 4 evidence that supports and detracts from the Commissioner’s conclusion.
 5 See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Desrosiers v.
 6 Sec’y of Health & Human Servs., 846 F.2d 573, 576 (9th Cir. 1988). “The
 7 ALJ is responsible for determining credibility, resolving conflicts in medical
 8 testimony, and for resolving ambiguities.” Vasquez v. Astrue, 572 F.3d
 9 586, 591 (9th Cir. 2009) (citing Andrews, 53 F.3d at 1039). Where the
 10 evidence is susceptible to more than one rational interpretation, the ALJ’s
 11 decision must be affirmed. Id. at 591 (citation and quotations omitted).

12 Section 405(g) permits this Court to enter a judgment affirming,
 13 modifying, or reversing the Commissioner’s decision. 42 U.S.C.A. §
 14 405(g). The matter may also be remanded to the SSA for further
 15 proceedings. Id.

16 17 **VI. DISCUSSION**

18 Plaintiff contends the ALJ committed error by failing to articulate
 19 sufficient reasons for discrediting his symptom testimony and finding him
 20 not credible. (Pl.’s Mem. at 3-12.)

21 In determining a claimant’s residual functional capacity² at steps four
 22 and five of the sequential evaluation process, the ALJ must consider all
 23 relevant evidence in the record, including medical records, lay evidence,
 24 and “the effects of symptoms, including pain, that are reasonably attributed

25
 26 ²Residual functional capacity (“RFC”) is defined as “the most you can still
 27 do despite your limitations.” See 20 C.F.R. § 404.1545(a)(1); 20 C.F.R. §
 28 416.945(a)(1). “Ordinarily, RFC is the individual’s maximum remaining ability to
 do sustained work activities in an ordinary work setting on a regular and
 continuing basis, ... mean[ing] 8 hours per day, for 5 days a week, or an
 equivalent work schedule.” SSR 96-8p, 1996 WL 374184, at *2 (emphases
 omitted).

1 to a medically determinable impairment.” See Robbins v. Soc. Sec.
2 Admin., 466 F.3d 880, 883 (9th Cir. 2006) (citing SSR 96-8p, 1996 WL
3 374184, at *5). “Careful consideration must be given to any available
4 information about symptoms because subjective descriptions may indicate
5 more severe limitations or restrictions than can be shown by objective
6 medical evidence alone.” SSR 96-8p, 1996 WL 374184, at *5; see also 20
7 C.F.R. § 404.1529(c)(3). When considering a claimant’s subjective
8 symptom testimony, “if the record establishes the existence of a medically
9 determinable impairment that could reasonably give rise to the reported
10 symptoms, an ALJ must make a finding as to the credibility of the
11 claimant’s statements about the symptoms and their functional effect.”
12 Robbins, 466 F.3d at 883 (9th Cir. 2006) (citing SSR 96-7p, 1996 WL
13 374186, at *1). “While an ALJ may find testimony not credible in part or in
14 whole, he or she may not disregard it solely because it is not substantiated
15 affirmatively by objective evidence.” Id. Rather, an ALJ may only find a
16 claimant not credible by making specific findings as to credibility and
17 stating clear and convincing reasons to discount the claimant’s subjective
18 symptom testimony. Id.; see also Lingenfelter v. Astrue, 504 F.3d 1028,
19 1036 (9th Cir. 2007); Garrison, 759 F.3d at 1014-15.

20 The ALJ found Plaintiff’s statements concerning the intensity,
21 persistence, and limiting effects of his symptoms not entirely credible for
22 the following reasons: (1) Plaintiff’s daily activities are not limited to the
23 extent one would expect given his complaints of disabling symptoms and
24 limitations; (2) Plaintiff has not received the type of medical treatment one
25 would expect for an individual claiming restrictive work limitations; (3)
26 There was a lack of objective medical evidence in the record to support
27 Plaintiff’s allegations of severe limitations; (4) Plaintiff provided
28 contradictory information about whether he had worked since his alleged

1 onset date; and (5) Plaintiff's work history raises a question whether his
2 continuing unemployment is actually due to medical impairments. (Admin.
3 R. at 13-14.)

4 It is proper for an ALJ to consider the claimant's daily activities in
5 making his credibility determination. See, e.g., Thomas v. Barnhart, 278
6 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §§ 404.1529(c)(3)(i),
7 416.929(c)(3)(i) (claimant's daily activities relevant to evaluating
8 symptoms). "One does not need to be 'utterly incapacitated' in order to be
9 disabled." Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing
10 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). "[M]any home activities
11 are not easily transferable to what may be the more grueling environment
12 of the workplace, where it might be impossible to periodically rest or take
13 medication." Fair, 885 F.2d at 603. Only if a claimant's level of activities is
14 inconsistent with his claimed limitations would activities of daily living have
15 any bearing on the claimant's credibility. Reddick v. Chater, 157 F.3d 715,
16 722 (9th Cir. 1998). Here, Plaintiff's daily activities, namely, babysitting his
17 granddaughter and performing housework, including dishes and
18 vacuuming, were not inconsistent with his testimony that he is able to stand
19 for 4 hours, sit without limitation, and lift 20-30 pounds. Therefore,
20 Plaintiff's daily activities do not provide a basis for the ALJ to find Plaintiff
21 not credible. Nonetheless, Plaintiff's testimony about his daily activities
22 does not necessarily help him establish disability, either, as it is not
23 inconsistent with an ability to function in a workplace environment.
24 Therefore, this factor weighs neither for nor against the ALJ's evaluation of
25 Plaintiff's pain testimony.

26 The Court finds the ALJ's second reason for discounting Plaintiff's
27 credibility, that Plaintiff has not received the type of medical treatment one
28 would expect for an individual claiming restrictive work limitations, to be

1 clear and convincing. Plaintiff had arthroscopic surgery on his left knee
2 around 2002 or 2004 which apparently improved his symptoms, and
3 though he claims “on and off” pain since then, the record shows he did not
4 seek any evaluation or treatment until 2011, just prior to filing his
5 applications for DIB and SSI. An “unexplained, or inadequately explained,
6 failure to seek treatment” is a relevant factor in assessing credibility of pain
7 testimony. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991). The ALJ
8 additionally noted Plaintiff only uses ibuprofen and Tylenol for pain relief,
9 and the little treatment he received was essentially routine and
10 conservative in nature. (See Admin. R. at 13.) Receiving only “minimal”
11 and “conservative” treatment is a valid reason to discredit a claimant’s
12 symptom testimony. Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999).

13 As for the ALJ’s third stated reason for discounting Plaintiff’s pain
14 testimony, although an ALJ may not disregard a claimant’s testimony
15 “*solely* because it is not substantiated affirmatively by objective medical
16 evidence” (see Robbins, 466 F.3d at 883 [emphasis added]), the ALJ may
17 consider whether the alleged symptoms are consistent with the medical
18 evidence as one factor in his evaluation. See Lingenfelter, 504 F.3d at
19 1040; see also Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)
20 (“Although lack of medical evidence cannot form the sole basis for
21 discounting pain testimony, it is a factor that the ALJ can consider in his
22 credibility analysis.”) Given the minimal medical evidence in the record, as
23 summarized above, the ALJ’s determination that the record does not
24 support Plaintiff’s allegations of disability is clear and convincing.

25 The ALJ’s fourth proffered reason for discounting Plaintiff’s symptom
26 testimony is two-fold: that Plaintiff provided inconsistent testimony
27 regarding his past work, and that Plaintiff’s impairment did not previously
28 prevent him from working strongly suggests it would not currently prevent

1 him from working. (Admin. R. at 13-14.) In his applications for DIB and
 2 SSI, Plaintiff stated he had been unable to work since December 26, 2003.
 3 (Id. at 160.) He told the consultative examiner, Dr. Dao, that he had last
 4 worked as a mover helper in 2004. (Id. at 283.) At the administrative
 5 hearing, Plaintiff testified he had last worked in 2006 or 2007 as a seasonal
 6 worker for moving companies, but then provided testimony he had worked
 7 in 2011 as a bell ringer for the Salvation Army. (Id. at 29-31.) Plaintiff's
 8 earning records reflected he worked in 2005, when he earned \$6,171.72,
 9 and then not again until 2011, when he earned \$1,293.00 working for the
 10 Salvation Army. (Id. at 188.)³

11 Inconsistent statements and testimony can bear upon a claimant's
 12 credibility. See, e.g., Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir.
 13 1999). The record is not clear whether the contradiction between Plaintiff's
 14 onset date and when he last performed work was the result of Plaintiff not
 15 being completely truthful or a failure to remember dates. However, the
 16 ALJ's observation that Plaintiff was not previously prevented from working
 17 despite the presence of his alleged impairment at approximately the same
 18 level of severity is a clear and convincing reason to discredit Plaintiff's pain
 19 testimony.

20 The fifth reason proffered by the ALJ for discounting Plaintiff's
 21 credibility relates to the issue of whether his continuing unemployment is
 22 actually due to medical impairments. As the ALJ stated:

23 A review of the claimant's work history shows that the claimant
 24 worked only sporadically prior to the alleged disability onset
 25 date, which raises a question as to whether the claimant's
 26 continuing unemployment is actually due to his medical
 impairments. The claimant testified that he seldom held a full
 time job because he has a felony record which makes it difficult

27 ³At the conclusion of the administrative hearing, Plaintiff's attorney
 28 attempted to amend the alleged onset date to January 7, 2006. (Admin. R. at
 44.) Although the ALJ accepted the amendment (see id.), his written decision
 still reflects a disability onset date of December 26, 2003 (id. at 9).

1 to be hired full time. He was convicted of armed robbery more
 2 than 30 years ago. The claimant stated that he has not applied
 for a full time job since 1986 or 1987.

3 (Admin. R. at 14.) An ALJ may properly consider a claimant's work record
 4 when weighing a claimant's credibility. Light v. Soc. Sec. Admin., 119 F.3d
 5 789, 792 (9th Cir. 1997). Here, the ALJ could properly find Plaintiff's
 6 testimony regarding the reasons he had not sought work and had been
 7 unemployed for so long undermined his credibility and his claim that his
 8 knee impairment prevented him from working.

9 An ALJ's assessment of pain severity and claimant credibility is
 10 entitled to "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir.
 11 1989). The Court concludes the ALJ articulated sufficient clear and
 12 convincing reasons supported by substantial evidence to discount Plaintiff's
 13 subjective pain testimony.

14 15 **VII. CONCLUSION**

16 For the reasons set forth above, the Court recommends Plaintiff's
 17 motion for summary judgment be **DENIED** and Defendant's motion for
 18 summary judgment be **GRANTED**.

19 This report and recommendation will be submitted to the Honorable
 20 Cynthia A. Bashant, United States District Judge assigned to this case,
 21 pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file
 22 written objections with the Court and serve a copy on all parties on or
 23 before **September 23, 2015**. The document should be captioned
 24 "Objections to Report and Recommendation." Any reply to the Objections
 25 shall be served and filed on or before **October 5, 2015**. The parties are
 26 advised that failure to file objections within the specified time may waive

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1 the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153
2 (9th Cir. 1991).

3 DATED: September 8, 2015

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5 Jan M. Adler
6 U.S. Magistrate Judge
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